Office-Supreme Court, U.S.
FILED
MAR 4 1981
ALEXANDER L. STEVAS,
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80-1524

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

PATRICIA ANN TIFFANY
PATRICIA ANN'S COUNTRY STORE,

Petitioner

vs.

COUNTY OF ALBEMARLE, VIRGINIA,

Respondent

PETITION FOR A WRIT OF CERTIORARI
ON APPEAL FROM THE
SUPREME COURT OF VIRGINIA

H. H. Tiffany
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Waynesboro, Virginia 22980

Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Did the Zoning Ordinance in question leave unbridled discretion to the local governing body in the issuance of special use permits?
2. Where unbridled discretion is permitted by a zoning ordinance, does the zoning ordinance violate the Fourteenth Amendment of the United States Constitution?
3. When the highest court of the State of Virginia holds that the granting of special use permits is a legislative function, and therefore does not require guidelines, does the State thereby permit special or individual legislation without uniformity in violation of the Fourteenth Amendment of the United States Constitution?
4. Where a zoning ordinance and comprehensive master plan are in conflict with each other so that the land owner

cannot determine with reasonable assurance what use he may make of his land, is the zoning ordinance then violative of the Fourteenth Amendment of the United States Constitution?

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Appendix A. Decision of the Supreme Court of Virginia

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Petitioner, Patricia Ann Tiffany, a resident of Virginia, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Virginia entered in this proceeding on December 4, 1980.

OPINION BELOW

The Court in this instance is requested to review the decision of the Supreme Court of Virginia dated December 4, 1980, attached hereto as Appendix A. The Plaintiff requests the consideration of this Court on the ground that the County of Albemarle in the State of Virginia is in violation of the Fourteenth Amendment of the U. S. Constitution by permitting individual legislation in zoning cases, with no uniformity in application.

IMPORTANT CASE OF FIRST IMPRESSION

Increasingly, local governing bodies are adopting the "use permit" process for practically all uses that a landowner would make of his land. This device gives the governing body more control over what the landowner does with her land. The highest court of Virginia has ruled that where the legislative body reserves this function unto itself guidelines, which would require uniformity, are not needed. This important

movement in the law of zoning and the law of private property has never been reviewed by this Court.

JURISDICTION

The federal constitutional questions raised in this appeal were raised in the trial court, in the original pleadings, and throughout the trial, and were again raised in the Petition for Appeal in the highest court in the State of Virginia. The Court in each instance failed to rule that the ordinance and its application to this case violated the petitioner's rights under the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The questions involved in this case are whether the petitioner's rights under the Fourteenth Amendment to the United States Constitution have been violated.

FACTS

Patricia Ann Tiffany, the landowner, received a special use permit in 1973 to operate a Country Store (General Store) on a tract of land consisting of 31.88 acres which formed the northwest quadrant of the Crozet Exit of Interstate 64 at U. S. 250. The use permit was granted for the construction of the store consisting of three floors of 4000 square feet to each floor and to be known as Patricia Ann's Country Store. Five acres of the 31.88 acres were then and remained zoned B-1 Business or Commercial. The store was not on that five acres. The minutes of the meeting of the Board of Supervisors on the present use permit request, revealed, through the remarks of Robert Tucker, the County Planner, that the five acres zoned commercial were ill designed for commercial use and such zoning was brought about by lack of planning in the haste of adopting an ordinance in 1968.

Testimony at trial revealed that despite numerous considerations of amendments to the ordinance, and the adoption of the master plan in 1971 and 1977, setting forth the guidelines for the basis of a new zoning ordinance, that no new zoning ordinance had then been able to obtain the consensus of the Board of Supervisors and the 1968 zoning ordinance remained in effect at that time.

The 1968 zoning ordinance sets forth certain agricultural uses which are permitted in an A-1 district as well as residential two-acre single-family housing and a few other uses, any of which may be utilized without the necessity of a special use permit. The ordinance sets forth numerous other permitted uses in an A-1 district which are permitted upon issuance of a special use permit. Two of those uses requiring such a special use permit are "General Stores (Country)" and "Gift Craft and Antique Shops". The testimony at trial showed that this

property is located on the Crozet Exit, which is approximately two miles along 250 from the new Western Albemarle High School, which high school is eastbound on 250 from the Interchange. The Interchange is five to six miles from the bottom of Afton Mountain when proceeding westbound along 250 from the Crozet Interchange. The undisputed evidence further showed that from the High School to the foot of the mountain were numerous commercial usages consisting of antique shops, a retail outlet of wood stoves, grocery stores, gift shops, fruit stands, an engineering office, the Highway Department Shop, the Moose Lodge, automobile garages, service stations, ending at the foot of the mountain with the Rockfish Gap Country Store, an operation similar to Patricia Ann's Country Store. The entrance to Patricia Ann's Country Store was the closest of such commercial uses to the Interchange and immediately adjoined the Interchange sharing the exit with the Plummer

property, which is zoned B-1 Business and which immediately adjoins the Tiffany land on the east.

The undisputed evidence adduced at trial revealed that the landowner had sold the 12,000 square foot building and two acres and the use permit had affixed to and followed the sale of the building and the landowner was applying for a use permit for a store identical in all respects to the former store except that the new store would occupy only 3,200 square feet of space. The former store was at the end of a 1400-foot access road and abutting against Interstate 64 on the rear while the new store was to be located on U. S. 250 set back two hundred feet from the highway and serviced by the same entrance road. Mr. Thomas Shumate of Higgs & Shumate, an Engineer & Surveyor, testified that on the 29.88 acres there existed three good sites for the construction of the commercial activity proposed and that

one of those three sites (the one closest to U. S. 250) had been chosen as the site for the now proposed smaller version of Patricia Ann's Country Store and that the site was relatively flat and serviced by the present access road which would be in all ways adequate, and in fact would meet the standards of the Virginia Department of Highways for width, visibility and grade for inclusion into the State Highway System. He testified that the construction could be completed without damage to the adjoining land. He also testified that Plummer property, consisting of five acres immediately adjoining the Tiffany property was zoned B-1 Business or Commercial and was far steeper than any portion of the Tiffany property and that five acres of the Tiffany property is zoned B-1 Business and is likewise far steeper than the area where the former Patricia Ann's Country Store is located or for that matter any other portion of the 31.88 acres with a present residue of 29.88 acres.

The Court permitted approximately 20 neighbors to testify that they were familiar with the operation of Patricia Ann's Country Store and familiar with the area and that the proposed use would not be detrimental to the health, safety and welfare of the community and would be in keeping with other uses already existing in the area. Approximately 20 additional persons, of similar qualifications, were recognized by the Court and accepted by the Court as tendering their testimony which would be cumulative in nature and generally in the same vein as those who had been permitted to testify.

The adjoining landowner on the west side, Mr. C. H. Gentry, testified that his property was zoned agricultural and he was aware of the proposed use, was in favor of such use, was aware of property values surrounding the Tiffany property and that the proposed use would not have a detrimental effect on the property values of anyone

elses' property. No objection was made to the proposed use of Patricia Ann's Country Store by any person, either at the Planning Commission meeting, the Board of Supervisors meeting or the trial below. One letter was received by the Planning Commission reciting that there was already sufficient commercially zoned land in the area and no more land should be re-zoned. No objection was made in that letter to the proposed use. All residents testifying stated that the area was predominently rural with commercialization along Route 250 and that the proposed use was in keeping with the kindred rural occupation in the area and would not change the character of the area. Many of the witnesses testified that the land had no other possible use whatsoever except for the proposed use. Testifying to all of the foregoing facts, among others, were Lloyd F. Wood, a member of the Board of Supervisors for 12 years, having left

the Board in 1975 and who was instrumental in the adoption of the present ordinance. Likewise, so testified Mr. Charles Dwyer, a real estate expert and up to recently, the Land Use Appraisal Administrator for the County of Albemarle, and Mr. William S. Roudabush, a surveyor who is presently a member of the Board of Supervisors. None of the witnesses for the defense stated that the proposed use would be injurious to the health, safety and welfare of the community. The defense, instead, relied upon the fact that approximately 114 acres of commercially zoned land existed in the area of the Crozet Interchange and that that was sufficient commercial land to be so zoned. Secondarily, the main thrust of the defense was that more than one special use permit should not be issued for any tract of land. No basis in law was recited for such principle and no consideration was given to the fact that the two acres with the former use permit was now severed, with

the permission and approval of the Board, from the original 31.88 acre tract and the residue of 29.88 acres had no outstanding use permit. Numerous photos and blue prints of the surrounding area were introduced by the plaintiff as exhibits. No evidence was ever adduced which would indicate any form of traffic hazard as a result. Mr. Keeler, Assistant County Planner, stated that the zoning ordinance was in deviation from the County Comprehensive Plan and that the existing zoning ordinance did not limit use permits to any specific number on any specific property. He further testified that although the comprehensive plan was adopted in 1977, and that an earlier comprehensive plan had been adopted in 1971, that no new zoning ordinance had been adopted to implement either comprehensive plan and that the 1968 zoning ordinance and 1968 zoning map which were in conflict with both the 1971 and 1977 comprehensive plans

were still in effect and permitted the proposed use upon the issuance of a special use permit.

STATEMENT OF THE CASE

The applicable section of the zoning ordinance of Albemarle County is as follows:

> "11-13 SPECIAL USE PERMITS
> 11-13-1. The governing body hereby reserves unto itself the right to issue all special exceptions and use permits permitted hereunder. Special use permits for uses as provided in this ordinance may be issued upon a finding by the governing body that such use will not be of substantial detriment to adjacent property, that the character of the district will not be changed thereby, and that such use will be in harmony with the purpose and intent of this ordinance, with the uses permitted by right in the district, and with the public health, safety and general welfare." (emphasis added)

The Virginia Supreme Court has held in Byrum v. Orange County, 217 Va. 37, 225 S.E. 2d, 369, (1976), that the governing body in granting or denying a use permit is acting in a legislative function and therefore has total discretion to grant a use permit or deny it. The zoning ordinance in the Byrum case was couched in the same language as the zoning ordinance in this case, that is to say that the word "may" was used in the ordinance. The Supreme Court of Virginia held that the term "may" allowed total legislative discretion to the board in granting or denying a use permit, with the sole restriction that the action of the board should not be "arbitrary, capricious or unreasonable". There are numerous acts which a local governing body could accomplish that would deny uniformity of application of the law to the various citizens of the county

without being "arbitrary, capricious or unreasonable". The Virginia Supreme Court further held in Byrum that had the local governing body delegated to an administrator the responsibility for issuing a use permit, the law would have required adequate guidelines and standards. It ruled, however, that where the governing body who is the legislative body reserves unto itself the right to grant or deny a use permit, it does not need guidelines because the board is the same body that would determine and promulgate the guidelines and standards and would issue the use permits. This reasoning under which the recited passage of the Albemarle County zoning ordinance has been upheld is a violation of the Equal Protection Clause of the United States Constitution inasmuch as it does not guarantee uniformity in application to all of the citizens of Albemarle County. In the case of Patricia Ann Tiffany, for instance, the

guidelines set forth certain criteria, which have been set forth in this petition heretofore. Nothing in the guidelines referred to the number of use permits that could be issued on a property, and yet a member or the Board of Supervisors who testified at the trial said that his reasoning for the denial was that more than one use permit should not be permitted on a given property, supposedly regardless of acreage.

Under the United States Constitution the appellant is entitled to the equal protection of the law and shall not be deprived of her property without due process of law.

The reasoning which led the Virginia Supreme Court and the United States Supreme Court to hold a zoning ordinance constitutional in Gorieb v. Fox, 274 U.S. 603, 47 S.Ct. 675, affirming 145 Va. 554, 134 S.E. 914, supplies the ground rules for declaring the instant zoning ordinance unconstitu-

tional if the zoning ordinance is to be read in conjunction with the comprehensive plan and yet is "in distinct conflict with the comprehensive plan or master plan" as it affects appellant's property. The cornerstones of this and all constitutional tests of a zoning ordinance are predictability and uniformity. If they are lacking, then no property owner can reasonably be expected to know what use he may make of his property. Furthermore, the governing body would then be at liberty to provide individual legislation to "bestow the benefits on some and deny it to others".

> "Constitutional uniformity is secured where the law operates alike on all who come within the scope of its provisions, or upon every person, subject, or object within the relation or circumstances provided for, or upon all persons or things within a legitimate class to which, alone, the statute is addressed, or upon all the individuals of a class for which the legislature is authorized to make specific laws, or, in general, where the statute makes a reasonable classification."
> 73 Am Jur 2d, Statutes, §43

The comprehensive plan or master plan of Albemarle County under which the trial court rested its decision is so general as to not even define the appellant's land and, therefore, deprives the appellant of the reasonable equal protection of the law if the master plan is construed to zone appellant's land as the Court found in its letter opinion.

The Virginia Supreme Court in its holding in City of Winchester v. Glover, 199 Va. 70, 97 S.E. 2d 661, (1957) held that the legislative body was acting in an administrative capacity in granting a use permit and was bound by its guidelines. The Supreme Court of Virginia in the Byrum decision expressly overruled its earlier decision announced in Glover and said instead that the board "may" be bound by guidelines. This judicial construction of the function of guidelines in a zoning ordinance places Virginia out of step with

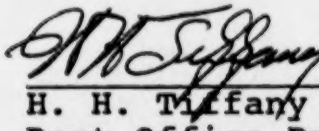
all of her sister states and allows a local governing body to seize absolute control of all of the land in its county by merely requiring that a use permit be obtained for practically all uses and then inserting the word "may" in the guidelines so as to conform with the Byrum case. This would allow the board to deny a permit to one person and grant it to another when they are both similarly situated, just so the action was not "arbitrary, capricious or unreasonable". The intention of zoning ordinances was not to remove the function of private property to the governing body, but instead to guarantee uniform use of land so as to protect all of the land. The Virginia decisions have now in effect unconstitutionally removed the decisions of private land to the local governing body and is a taking of the land, which taking is in violation of the United States Constitution and made applicable to the

several states by the Fourteenth Amendment to the United States Constitution.

CONCLUSION

For the aforesaid reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of Virginia.

Respectfully submitted,



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Counsel for Petitioner

NOTARIZED STATEMENT OF MAILING

I, H. H. Tiffany, an attorney who is a member of the Bar of the Supreme Court of the United States, hereby certify that on this 4th day of March, 1981, I personally mailed by first class mail by placing it in the United States Postal Service mailbox at Waynesboro, Virginia, postage pre-paid, and did so within the time permitted by Rule 28 of the Rules of the Supreme Court of the United States, the said 4th day of March, 1981 being the 90th day following the decision of the Supreme Court of Virginia, the Petition for Certiorari and Notice of Appeal.

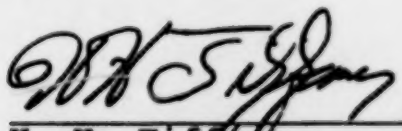
H. H. Tiffany

Subscribed and sworn to before me, a Notary Public for the State of Virginia at large on this 4th day of March, 1981.

Carmen C. Palumbo
Notary Public
My Commission Expires: 10-11-83
10.

CERTIFICATE

I hereby certify that I have forwarded by ordinary mail three (3) copies of this Petition to Frederick W. Payne, Deputy County Attorney, 416 Park Street, Charlottesville, Virginia 22901 on this 4th day of March, 1981 and have mailed a true copy hereof to the Supreme Court of Virginia, State Supreme Court Building, Richmond, Virginia 23219 on the 4th day of March, 1981.



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Waynesboro, Virginia 22980

Counsel for Petitioner

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday *the* 4th *day of* December, 1980.

Patricia Ann Tiffany, d/b/a, etc., Appellant,

against Record No. 801090
Circuit Court No. 2871-C

County of Albemarle, Appellee.

From the Circuit Court of Albemarle County

Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the above-styled case.

A Copy,

Teste:

Allen L. Lucy, Clerk

By: Deputy Clerk

APPENDIX A